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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court for the County of Saginaw, Michigan is printed as appendix A, *infra,* and is unreported.

The Michigan Supreme Court's opinion is printed as appendix B, *infra,* and is reported at 375 Mich. 490, 134 N.W. 2d 637 (1965).

JURISDICTION

The judgment of the Supreme Court of Michigan was dated and entered on May 10, 1965. On May 28, 1965 an application for rehearing was duly submitted and the application for rehearing was denied, dated and entered on October 4, 1965.

The jurisdiction of this Court was timely invoked under Article III, Section 2 of the United States Constitution and under 28 USC 1257.

The Honorable Justices of the Supreme Court of the United States on February 21, 1966 granted the petitioner a writ of certiorari and the case was placed on the summary calendar.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the 14th Amendment to the United States Constitution.

The germane part thereof reads: "• • • nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

The State statute involved is Act No. 201 of the Michigan Public Acts of 1953 (CLS 1956, §300.201 [Stat Ann. 1958, 13.1485]) which reads:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the

purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

QUESTIONS PRESENTED

I.

Is the petitioner's constitutional right to due process of law under the 14th Amendment to the United States Constitution violated when the State Supreme Court reverses a judgment and renders judgment absolute against the plaintiff-petitioner, the successful party in the trial court, upon a statute and question of fact that was never before the trial court and concerning which the plaintiff had no opportunity to plead or offer evidence?

II.

Are the petitioner's rights to due process of law under the 14th Amendment to the United States Constitution violated when a State Supreme Court renders a decision based upon a statute requiring determination of facts for its application, when the statute was raised for the first time in the respondent's brief on appeal, and which decision in effect gives the respondent two days in court by permitting it to change its theory of defense on appeal while holding the petitioner to his claim as alleged to be set forth in his pleadings and in the trial record?

III.

Does the application of a state statute which, as interpreted by the State Supreme Court, requires minors who are injured or die while on the property of another for the purpose of fishing, hunting or trapping to pay to such owner a valuable consideration therefor, or to prove gross negligence or wilful and wanton misconduct of the owner in order to recover while other minors who are injured or die on the same property but who are not engaged in such activities can recover upon proof of ordinary negligence of the owner without a showing of payment of a valuable consideration deny to the former class of minors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

THE BASIC FACTS

Trial Facts

Four days before Christmas, 1958, two small children, David Heider, age 8, and his half brother, James Heider, age 12, with their dog, a water spaniel, went upon the property of the respondent, Michigan Sugar Co. which maintained acres and acres of artificial open storage ponds. It was 12° below zero. The ponds were frozen solid except around the overflow pipe concealed in vegetation connecting each pond. The movement of liquid out of the overflow pipe, coupled with the chemicals in the water, created a large area of foamy-soapy, snow-like substance that built up over the open water, the soft ice and part of the solid ice.

The respondent maintained this trap-like, deceptive and dangerous condition knowing that trespassers came upon its property, but maintained no danger or warning signs.

The tracks of the two children and their dog led across solid ice and into the accumulated foamy snow-like substance where the children became entrapped and drowned. The older child, David, had a Red Cross merit swimming certificate.

There were no eye witnesses who saw the children on the property at the time nor did anyone witness the drownings.

An Administrator was appointed and suit instituted for their wrongful deaths. Suit was based on Michigan common law providing that trespassing children have a cause of action for ordinary negligence against an occupier of land who maintains a dangerous condition upon his land if he knows or should know that they trespass thereon.

David's case, containing elements of special damages, was tried before a jury, while James' case was tried before the Judge. The jury's verdict was for $125,000.00 and the Judge's verdict was for $40,939.65.

Procedural Facts

Defendant-respondent's motion for new trial was denied. The defendant-respondent filed an appeal to the State Supreme Court setting forth its grounds and reasons for appeal.

The defendant-respondent's attorney, in filing his brief on appeal, added a new section beyond his reasons and grounds for appeal, wherein he asked, completely out of all procedural order, that P. A. 1953 No. 201 (CLS 1956

§300.201 [Stat. Ann. 1958, Rev. §13.1485]) be considered by the State Supreme Court in connection therewith.

Said statute reads:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

The defendant-respondent's attorney admits with candor, his lack of diligence in failing earlier to find and invoke said statute in the trial and Supreme Court. Only a cursory treatment and briefing was given to this improperly raised statute.

The case was orally argued and duly submitted to the State Supreme Court on January 9, 1964. On May 10, 1965 the State Supreme Court rendered its divided decision.

The applicability of the above quoted statute, P. A. 1953 No. 201, caused a multi-split decision, of eight judges.

Two Judges stated:

> "There is no claim in this case that the defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going on defendants' premises • • • The total lack of proof to meet any of these requirements makes this statute applicable"

and then ordered the case reversed and the lower court to enter judgments of no cause of action.

Three Judges stated:

> "* * * Fairly read, it seems to me the whole thrust of the declarations is that the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people did so and that defendant was ordinarily negligent in the maintenance of the premises."

They then held that the statute was jurisdictional and ordered the cases reversed and instructed the lower court to enter an order dismissing the declaration for failure to state a cause of action.

Three other judges wrote "The declarations do not disclose the applicability of P. A. 1953, No. 201, to bar plaintiffs asserted cause of action". Then citing various paragraphs of the plaintiffs' declaration wrote, "Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of P. A. No. 201, on the conclusionary assumption that the boys were 'on the lands of another * * * for the purpose of fishing, hunting or trapping'. Nor of course did the defendant plead any fact from which either the trial court or we properly could conclude that the boys' purpose in going upon the defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally the record below fails to disclose any direct evidence that the boys in fact went upon the defendant's land to hunt, fish or trap."

These three judges voted to affirm the judgment of $125,000.00 for David Heider's death, but remanded the James Heider case to the lower court, for a reappraisal of damages as requested by the plaintiff's cross-appeal and further stated: "In the case of James D. Heider, upon remand, the trial court will determine any questions of fact which

may be raised and especially the question as to whether he 'went on the lands of another * * * for the purpose of fishing, hunting or trapping.' The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning of the statute, the word 'person' being undefined and subject to construction in the light of strong public policy favoring the protection of minors; whether the classification of the statute violates due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution."

As to the validity of the defendant raising the statute in its brief on appeal, these same three judges stated "Counsel for defendant stress *Morris v. Radley,* 306 Mich. 689 in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception, only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

"Such is not the case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. For these reasons it is not applicable at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense."

On May 28, 1965 an application for rehearing was timely and duly filed. On October 4, 1965, the application for rehearing was denied without opinion, but with two dissents.

In the application for rehearing, the plaintiff first claimed violation of his United States Constitutional rights to due process and equal protection of the law, under the 14th Amendment both as to the State Supreme Court's opinion being in violation of the plaintiff-petitioner's rights and as to the statute P.A. 1953 No. 201 being unconstitutional as applied to children.

ARGUMENT I.

Question

IS THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE STATE SUPREME COURT REVERSES A JUDGMENT AND RENDERS JUDGMENT ABSOLUTE AGAINST THE PLAINTIFF-PETITIONER, THE SUCCESSFUL PARTY IN THE TRIAL COURT, UPON A STATUTE AND QUESTION OF FACT THAT WAS NEVER BEFORE THE TRIAL COURT AND CONCERNING WHICH THE PLAINTIFF HAD NO OPPORTUNITY TO PLEAD OR OFFER EVIDENCE?

Law

Constitutionally each litigant is entitled to his day in court, but the manner in which the Supreme Court of Michigan applied Act No. 201, Michigan Public Acts of 1953, denied to petitioner that right.

The respondent invoked Act No. 201, Michigan Public Acts of 1953, C.L.S. of 1956, §300.201, Stat. Ann. §13.1485,

for the first time in its brief filed in the State Supreme Court. At the time this cause of action arose and at the time of trial, the statute provided:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

In applying this statute to this case a State Supreme Court of eight Justices handed down three different opinions.

Two Justices, speaking through Justice Kelly, made no mention of the application of the statute to the pleadings, but held that petitioner's evidence as set forth in the record failed to prove by a preponderance of the evidence such facts as to exclude the operation of the statute, stating that, "the total lack of proof to meet any of these requirements [payment of a valuable consideration, or proof of gross negligence or wilful and wanton misconduct] makes this statute applicable" (327), and ordered entry of a judgment of no cause of action.

This reasoning destroys the petitioner's case without giving him any opportunity to produce evidence taking the case outside the scope of the statute.

Three Justices, speaking through Justice O'Hara, held that the statute raised was jurisdictional, and that the petitioner was bound by his pleadings which failed to set forth a cause of action outside the scope of the statute.

Three Justices, speaking through Justice Adams, in upholding the petitioner's contentions stated:

> "The declarations do not disclose the applicability of P.A. 1953 No. 201 to bar plaintiffs' [petitioner's] asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog 'set out muskrat trapping'; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of P. A. 1953, No. 201, on the conclusionary assumption that the boys were 'on the lands of another
>
> * * * for the purpose of fishing, hunting or trapping.' Nor, of course, did the defendant plead any facts from which either the trial court or we could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt or trap" (335-336).

If the statute had been properly invoked at the trial level, the petitioner would not have been denied his day in court, for he could have exercised his right to amend pleadings, if necessary. But more than that, the petitioner would have been assured a fair trial. By proofs, he could show as he did by affidavits attached to his petition for rehearing that little David, age 8, was physically incapable of trapping, owned no traps, and had never trapped (342-346); that the testimony established that there were no eye witnesses to the drownings (92); and that, therefore, there existed a question of fact under the statute as to the reason why James, age 12, was upon the

respondent's property at the time he drowned. These are but a few of the facts which petitioner could produce at a trial where he is properly confronted with a defense grounded upon Act 201, Michigan Public Acts of 1953.

As it is, the decision of the State Supreme Court not only strips petitioner of his judgments, but serves to reward respondent for its negligence in failing to invoke the statute timely.

In *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), this Court in a unanimous decision, speaking through Justice Oliver Wendell Holmes, held that it was a violation of due process for a State Supreme Court to reverse a case and render judgment absolutely against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had, therefore, no occasion and no proper opportunity to introduce his evidence.

As Justice Oliver Wendell Holmes said in *Saunders, supra* (244 U.S. at 319-320):

> "* * * He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissibble, in order to rebut the testimony already ruled to be inadmissible, in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the cases should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on

the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

"* * * But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278."

Clearly your petitioner has been denied due process for he has unfairly been deprived of his day in court in relation to P.A. 1953 No. 201.

ARGUMENT II.

Question

ARE THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE SUPREME COURT RENDERS A DECISION BASED UPON A STATUTE REQUIRING DETERMINATION OF FACTS FOR ITS APPLICATION, WHEN THE STATUTE WAS RAISED FOR THE FIRST TIME IN THE RESPONDENT'S BRIEF ON APPEAL, AND WHICH DECISION IN EFFECT GIVES THE RESPONDENT TWO DAYS IN COURT BY PERMITTING IT TO CHANGE ITS THEORY OF DEFENSE ON APPEAL WHILE HOLDING THE PETITIONER TO HIS CLAIM AS ALLEGED TO BE SET FORTH IN HIS PLEADINGS AND IN THE TRIAL RECORD?

Law

Litigation must come to an end. The defendant-respondent has had its day in court with ample opportunity to raise and present all defenses. It is not the function of a court on review to correct the inadvertence or failure of counsel to present what might have been a defense. For justice sake, litigation should be promptly and properly tried and decided.

These causes of action arose for the wrongful death of two boys, David Heider, age eight and James Heider, age twelve. The pleadings, issues and trial were framed within the Michigan rules of common law as expounded in Section 339 of the Restatement of Torts which reads:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

a. the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The respondent permitted to exist, without warning signs, an extremely deceptive and treacherous condition on the surface of the ice surrounding its overflow pipe, knowing that trespassers, such as the petitioner's decedents, came upon its property, and as a result petitioner's decedents became entrapped and were drowned.

The respondent interposed a general denial, and claimed contributory negligence on the part of the boys, their parents, or guardians; lack of knowledge that the minors were upon its premises; and that adequate warning not to use the premises had been given.

Upon the issues thus framed, trial in David Heider's case, which consumed approximately one week, resulted in a jury verdict of $125,000.00, and in James Heider's case, a trial before the judge resulted in a verdict of $40,989.65.

Motions for new trials were filed by respondent but denied by the trial judge. Respondent then took appeal

to the State Supreme Court. All the errors claimed by the respondent, in its motion for new trial and in its grounds for appeal to the State Supreme Court were in effect rejected. Two of the eight Justices of the State Supreme Court ruled in part that the petitioner had failed to prove his case by a preponderance of the evidence. However, the balance of that opinion and the other two opinions fail utterly to support the respondent or overrule the petitioner on any claimed error in the trial proceedings. The respondent failed to bring to the trial court's attention Act No. 201, Michigan Public Acts of 1953, and failed to raise said statute before the State Supreme Court in its grounds for appeal. The respondent, entirely out of order due process-wise, inserted the statute as an afterthought in its brief on appeal, but with candor admitted its lack of diligence in earlier asserting the statute.

The differing opinions rendered by the State Supreme Court forcibly demonstrate the havoc that can be wrought where a statute requiring determination of factual issues for its application is permitted to be raised at the 11th hour and then is acted upon by an appellate court.

Such a situation forces petitioner to live with his pleadings and the trial record in their original form, while relieving the respondent from its pleadings and from the trial record, and permitting it to substitute an entirely different theory of defense.

In *Saunders v. Shaw, supra,* the petitioner was held to have been deprived of his day in court. Certainly no litigant is entitled to the reverse, namely, two days in court. When all the issues which are presented or which could have been presented were fairly and justly tried, the respondent had its day in the trial court. It had the opportunity to

raise each and every available defense. It elected through neglect, to defend only upon certain principles and theories. Constitutionally speaking, it had its day in court.

By being permitted to invoke for the first time after trial has been completed and appeal perfected, a statute which requires determination of factual issues for its application, the respondent gained an awesome advantage which it could not otherwise gain, namely, complete surprise and a victory unconstitutionally achieved.

The petitioner respectfully submits that he was not accorded due process of law when the State Supreme Court rendered a decision based upon a statute which required determination of facts for its application and which was raised for the first time in respondent's brief on appeal, thereby affording respondent two days in court by permitting it to change on appeal its theory of defense while holding petitioner to his claim as set forth in his pleadings and in the trial record.

ARGUMENT III.

Question

DOES THE APPLICATION OF A STATE STATUTE WHICH, AS INTERPRETED BY THE STATE SUPREME COURT, REQUIRES MINORS WHO ARE INJURED OR DIE WHILE ON THE PROPERTY OF ANOTHER FOR THE PURPOSE OF FISHING, HUNTING OR TRAPPING TO PAY TO SUCH OWNER A VALUABLE CONSIDERATION THEREFOR, OR TO PROVE GROSS NEGLIGENCE OR WILFUL AND WANTON MISCONDUCT OF THE OWNER IN ORDER TO RECOVER WHILE OTHER MINORS WHO ARE INJURED OR DIE ON THE SAME PROPERTY BUT WHO ARE NOT ENGAGED IN SUCH ACTIVITIES CAN RECOVER UPON PROOF OF ORDINARY NEGLIGENCE OF THE OWNER WITHOUT A SHOWING OF PAYMENT OF A VALUABLE CONSIDERATION DENY TO THE FORMER CLASS OF MINORS THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Law

The statute in question, as it provided at the time these causes of action arose, and at the time of trial and as applied by the State Supreme Court, is a drastic change from the common law of Michigan. By the common law, trespassing children have a cause of action for ordinary negligence against an occupier of land who maintains a dangerous condition upon his land if he knows or should know they trespass thereon.

In Michigan the children engaged in the following activities on the land of another obtained recovery for ordinary negligence; *Lyshak v. City of Detroit,* 351 Mich. 230, 88 N.W. 2d 596 (1957) (playing on a golf course); *Nielsen v. Stevens,* 359 Mich. 130, 101 N.W. 2d 284 (1960) (bicycle

riding); *Carlisi v. City of Marysville,* 373 Mich. 198, 128 N.W. 2d 477 (1964) (swimming); *Huggett v. Ebb,* 182 Mich. 524, 148 N.W. 805 (1914) (injured by R.R.); *Powers v. Harlow,* 53 Mich. 507, 19 N.W. 257 (1884) (8 yr. old playing with dynamite); *Jaworski v. Detroit Edison Co.,* 210 Mich. 317, 178 N.W. 71 (1920) (8 yr. old killed by phone pole used as teeter); *Peklenk v. Isle Royale Copper Co.,* 170 Mich. 299, 136 N.W. 352 (1912) and 187 Mich. 644, 153 N.W. 1068 (1915) (12 yr. old drowned in pit); *Parsons v. Powder Co.,* 198 Mich. 409, 164 N.W. 413 (1917) (7 yr. old drowned on ice covered Saginaw River by deceptive conditions).

Is the purpose for which a child goes on the land a reasonable basis for classification where the state statute is so restrictive as to prohibit recovery for ordinary negligence to a child who only hunts, fishes, or traps without paying to the landowner a valuable consideration while allowing recovery for ordinary negligence to a child who goes on the land for any other purpose without paying to the landowner a valuable consideration? It is reasonable that a non-paying child who drowns while swimming is entitled to recover on the basis of ordinary negligence while a non-paying child who drowns while fishing in the same water is prevented from recovering on the basis of ordinary negligence? Is it reasonable to deny recovery for ordinary negligence to a non-paying child who sets a trap and then drowns because of a deceptive condition, and to allow recovery for ordinary negligence to a non-paying child who drowns while ice skating at the same location?

The prohibition of the equal protection clause goes no further than the invidious discrimination, *Morey v. Doud,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957), which is clearly worked here by this statute which without rea-

sonable basis places a far greater burden of proof upon children who are injured or die while engaged in fishing, hunting or trapping than that to be borne by children who are injured or die at the very same location while engaged in other activities.

Assume for the sake of argument only that David, age 8, was not trapping, but was merely tagging along with his older brother, James, age 12, who was trapping on respondent's property when they drowned. Under the statute, recovery for David's death could be had on the basis of ordinary negligence of the landowner but recovery for James' death could be had only upon proof of gross negligence or wilful and wanton misconduct, although both children died together as a result of the identical negligence of the landowner.

The petitioner submits that *Oyama v. California,* 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948), is in point. In *Oyama,* a minor son of an alien not eligible for naturalization was placed by California law under a burden of overcoming a statutory presumption of intent to evade the escheat laws while minor children whose parents were either citizens or eligible aliens were not confronted with such a burden. This Court reversed the judgment of the Supreme Court of California and held that the minor son had been denied the equal protection of the laws, stating (332 U.S. at 644):

> "The cumulative effect, we believe, was clearly to discriminate against Fred Oyama. He was saddled with an onerous burden of proof which need not be borne by California children generally. The statutory presumption and the two ancillary inferences, which would not be used against most children, were given such probative value as to prevail in the face

> of a deed entered in the public records, four court orders recognizing Fred Oyama as the owner of the land, several newspaper notices to the same effect, and testimony that business transactions regarding the land were generally understood to be on his behalf. In short, Fred Oyama lost his gift, irretrievably and without compensation, solely because of the extraordinary obstacles which the State set before him."

The basic error in this case is that neither the plaintiff's attorney nor the defendant's attorney, nor the trial judge was cognizant of the statute in question and yet, belatedly, two children, ages 8 and 12, are held to full knowledge of the statute and with failure to pay consideration thereunder.

The petitioner respectfully submits that the application of this statute, as interpreted by the Supreme Court of Michigan, denies to these minor children the equal protection of the laws.

CONCLUSION

The petitioner prays:

1. If the Court rules that the petitioner has been denied his day in court in relation to the Michigan statute in question, that the judgment of the Supreme Court of Michigan be reversed and the cause remanded for new trial with costs to the petitioner.

2. If this Court rules that the Michigan statute in question was improperly considered or that the respondent had in effect two days in court, that the judgment of the Supreme Court of Michigan be reversed and that the judg-

ment of the trial court entered on May 17, 1962 in the amount of Forty Thousand Nine Hundred Eighty-Nine Dollars and Sixty-Five Cents ($40,989.65) in the case of James Heider be reinstated with statutory interest of 5% per year from the date thereof, that the judgment of the trial court entered on jury verdict on May 17, 1962 in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) in the case of David Heider be reinstated with statutory interest of 5% per year from the date thereof, with costs to the petitioner.

3. If this court rules that the Michigan statute in question is unconstitutional as applied to these children, that the judgment of the Supreme Court of Michigan be reversed and that the judgment of the trial court entered on May 17, 1962 in the amount of Forty Thousand Nine Hundred Eighty-Nine Dollars and Sixty-Five Cents ($40,989.65) be reinstated with statutory interest of 5% per year from the date thereof in the case of James Heider, and that the judgment of the trial court entered on jury verdict on May 17, 1962 in the case of David Heider in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) be reinstated with statutory interest of 5% per year from the date thereof, with costs to the petitioner.

Respectfully submitted,

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Detroit, Michigan 48226,
Attorney for Petitioner.

APPENDIX A

OPINION OF THE CIRCUIT COURT

(Filed May 10, 1962)

(Consolidated cases)

This Court has before it for decision at this time two distinctly different but connected cases, both of which involve a number of novel legal questions. Undoubtedly it might be more discreet for this Court to withhold its decision on one of these cases until the Michigan Supreme Court has indicated its opinion on the companion case. Since it appears inevitable, however, that both eventually will reach the Michigan Supreme Court, this Court conceives it to be in the best interests of justice to state its rulings as quickly and succinctly as possible on all of the various questions involved in order to expedite progress of this whole litigation toward appeal and the ultimate conclusion.

In doing so, this Court frankly acknowledges the extraordinary effort and ability which has gone into the preparation of the oral arguments and the voluminous briefs submitted over a period of time by counsel along with the lengthy transcript of the trial proceedings, all of which are available now. As this Court proceeds to examine in detail each of the reasons defense counsel asserted in support of the motion for a judgment notwithstanding the verdict, and in the alternative for a new trial in the case of David Heider, this Court was impressed again by the exceptional skill with which the able and experienced counsel on both sides presented their respective contentions throughout the entire proceedings. Consequently, this Court believes the record indicates that while all possible legal questions were raised and properly preserved for appeal great care was taken to make certain that the case was tried correctly and submitted fairly to the jury.

The jury instructions which defense counsel requested were given in so far as they accurately and appropriately set forth defendant's theory of the case. As plaintiff's counsel has specifically pointed out in his briefs, defendant's requests were refused only when they appeared to be improper because they assumed as facts matters actually in dispute, were argumentative, repetitious, overemphasized defendant's evidence, or were legally incorrect under the circumstances. Thus defendant's requested instruction that the ponds were constructed in accordance with government requirements for correction of water pollution would not be controlling on the question of whether or not they were negligently maintained with respect to trespassing children. The instructions claimed to be error, such as those on the presumption of decedents' freedom from contributory negligence, and deceaseds being trespassers as a matter of law, even if inaccurate, were probably more favorable than defendant deserved, since it appears that there was no evidence of any acts to support defendant's affirmative defense of contributory negligence or to rebut the presumption of deceaseds' due care. (Peklenk v. Isle Royal Copper Co., 187 Mich. 645). Furthermore, some of plaintiff's evidence might well have been interpreted to indicate that deceased's were licensees in trapping muskrat pests on defendant's property. In addition, defendant does not seem to have demonstrated that any material error occurred in the admission or rejection of evidence during the course of the trial. As a result of the errors which are claimed to have occurred actually appear upon re-examination at this time to be comparatively inconsequential, both with respect to their technical legal significance and their actual effect upon the trial. In other words, without elaborating further upon the reasons which opposing counsel have so fully developed in their various briefs, this Court will state that it has carefully reconsidered all of the rulings made upon the evidence and the instructions during the course of the trial and for the reasons detailed by plaintiff's counsel in his briefs, is of the opinion that they were substantially correct under all

the circumstances, and consisted no error as a matter of law. In any event, there appears to be no particular circumstances covered in defendant's motions which could be considered to have altered or affected the judgment as a matter of fact or should have overcome the statute which provides that:

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the Court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MSA 27.2618.

The principal defense asserted in these two cases, both to the jury as a matter of fact, and also, to the Court as a matter of law, on motions for a directed verdict, and for a judgment notwithstanding the verdict, was that the defendant Michigan Sugar Company was not guilty of any negligence in the operation of its business or the maintenance of its premises and that the unfortunate deaths on defendant's property resulted from an unavoidable accident or the conrtibutory negligence of the parties themselves or their legal guardians.

The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for them but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendants' property and was used to store water

from defendant's sugar manufacturing plant until some time in the spring when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up "no trespassing" signs at least twice a year but knew they did not remain in place and often were ignored.

On December 21, 1958, there was no sign in the vicinity of the pond which was largely frozen over in the 12 degree below zero temperature. A pipe was discharging into the pond water which apparently melted the nearby ice. It laso formed a frothy foamlike substance which blew and billowed up a foot or more above the water and the surrounding ice and became covered with snow. There were no eye witnesses to the tragedy but the physical facts indicated that after walking across the ice on the pond, the two boys and their dog all plunged through holes in the vicinity of the water pipe and were drowned.

Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however, that an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond. Defendant easily could have employed some sort of a warning device and sign to serve as a notice or caution to trappers and trespassers who were known to use that area frequently. That would not have limited or interfered in any way with defendant's profitable conduct of its business.

On the basis of a careful consideration of all the evidence and the now well established law of this State, this Court concludes that neither the two boys nor their guardians

were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

> "A possesor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there cause to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." (Lyshak v. City of Detroit, 351 Mich. 230; Nielsen v. Henry H. Stevens, Inc., 358 Mich. 130; 2 Restatement of Torts, Sec. 334, 339).

This Court is inclined to agree with plaintiff's counsel that the crucial, controlling question in this case is as follows:

> "Was the jury's verdict for $125,000 damages for the death of David Heider excessive under all the circumstances?"

It certainly would have been so considered under the Michigan decisions prior to Wycko v. Gnodtke, 361 Mich. 331, as the dissenting opinion in that case so emphatically declarss. The present case of David Heider, however, was tried in the light of the then very recent ruling law which is proclaimed by the majority of the Michigan Supreme Court in the Wycko Case, supra. In other words, the trial court unequivocally accepted the statement in the majority opinion in the Wycko Case, supra, at p. 338, that, "We now reject * * * the child labor measure of the pecuniary loss suffered through the death of a minor child, namely, their probable wages less the cost of their keep, and all cases consistent therewith we now overrule.".

The case was submitted to the jury, as nearly as possible in accordance with the new rule that, "The pecuniary value of a human life is a compound of many elements,

including mutual society and protection and companionship." What these are worth in terms of dollars was not indicated by the Michigan Supreme Court, which instead expressly stated:

> "It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created." p. 340, supra.

Both counsel here have offered in their arguments and briefs since the trial, widely different and extremely interesting examples of the increased income David's family might expect to obtain from investing in various ways the amount of money involved in this verdict. As this Court understands the majority opinion in the Wycko Case, however, the pecuniary loss resulting to a family from the death of a child is not measured solely by the extent to which the family's material standard of living is raised or lowered, by his being wrongfully removed from it forever, but by the value which can reasonably be attributed to the loss of mutual society and companionship suffered by the surviving members of the child's family.

It would seem to this Court that the pecuniary value of "mutual society, protection and companionship" would vary vastly with the precise circumstances of the particular individuals involved and might range from a very nominal to a most substantial amount, depending upon the jury's estimate of their importance to the parties. As a matter of fact and law, this is exactly what the courts of other States seem to have held when presented with this problem, which of course has not yet been judicially reviewed in this jurisdiction. Without attempting to emulate the eloquence of higher courts, who have substantiated comparable awards in child death cases, this Court selects from among the many cases cited by plaintiff's counsel, Sandifer Oil Company v. Dew, 71 So. 2d 725, 1954, where the Mississippi

Supreme Court in affirming a $90,000 verdict for the death of a 12 year old girl uses language which appears applicable here when it states, "We cannot put a value on loss of companionship and society; that is the function of the jury." Thus this Court understands that in Stephens v. US Mobile Homes of Florida, Inc. (25 NACCA Law Journal 400), a Florida court sustained a jury verdict for $150,000 for the death of electrocution of a 2½ year old child. In the present cause, an experienced jury of responsible, intelligent, business men and housewives heard the last jury case during that term of court and after an orderly trial which appeared to be unusually free from passion, prejudice, pressure, emotionalism or material error of any kind, rendered a verdict which it believed to be reasonable and just. This Court is not now inclined to alter it on the basis of the law and the facts before it.

In considering the case of James Heider, probably the most important question for this Court to decide is the amount of damages to be awarded. This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that therefore the damages should be higher in his than his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice. In the opinion of this Court, however, such a result does not appear to be permissible under the Michigan statute which creates the cause of action (Courtney v. Apple, 345 Mich. 223, headnotes 3 and 6; MSA 27.711). The statute and the Michigan cases construing it seem to have considered almost every contingency except the one which confronts the Court here. In MacDonald v. Quimby, 350 Mich. 21, which contains the most exhaustive analysis of the statute, the mother as well as the wife and children of the deceased,

was permitted to participate in the recovery of damages. Both opinions of the Court apparently concurred in the conclusion that: "The term 'next of kin' as used in the death act means the nearest blood relations who suffer a pecuniary injury and not all those who would take under the statute of distribution." MacDonald v. Quimby, supra, headnote 6.

Inasmuch as the deceased James Heider apparently had no legal obligation to support his grandparents with whom he lived (MSA 16.122 and 16.125) or his half brothers or sisters (Richardson v. Detroit and M. Ry. Co., 176 Mich. 413, head note 6) or his stepmother with whom he did not live (MSA 27.712; Stahl v. Grand Rapids and Ind. R.R. Co., 57 Mich. 239, headnote 6), it would appear that whatever their actual loss may have been under the circumstances, these relatives have sustained no pecuniary, legal damages as a result of James Heider's death (MacDonald v. Quimby, supra).

As defense counsel states,

> "It must be conceded that if defendant is found guilty of negligence, the plaintiff administrator could recover funeral expenses, beyond that we think no recovery should be allowed * * * on behalf of the father because (a) he had no right to recover for the cost of rearing the child because he incurred no expense in that regard. Whatever was expended by way of rearing the child was expended by the grandparents as volunteers. He should not be permitted to recover for loss of wages offset by room and board until age 21 because, by his own conduct, he had relinquished that right."

For the reasons already briefly mentioned earlier in this opinion, as well as those so elaborately set forth in the lengthy dissenting opinion of Courtney v. Apple, 345 Mich. 223, pp. 237-260, this Court believes that to award damages only for James Heider's funeral expenses would be un-

reasonable if not actually unconscionable particularly in the light of the changed rule of law established by the Michigan court in the Wycko Case, supra. It seems obvious to this Court that under the rule in the Wycko Case supra, the plaintiff Donald Heider, father of James Heider, is entitled to damages for the costs of raising James Heider, which appear from the evidence submitted in support of plaintiff's bill of particulars to be at least $10,989.65, which is less than the average estimated in 39 Michigan Bar Journal 11 and 54 N.W. Law Review, 254. The fact that deceased's grandfather, instead of deceased's father, furnished most of this should not in the opinion of this Court relieve the wrongdoer of his liability for it, any more than the voluntary contribution of an injured employee's wages or the payment under the contract of hospital or insurance benefits relieves the wrongdoer from the damages inflicted upon the injured victim (Kurti v. Probelske, 324 Mich. 179, headnote 5; Cawood v. Earl Paige Co., 239 Mich. 485).

The other compensable element of damages which plaintiff sustained in the loss of the society and companionship of his oldest son James who had reached an age where he would have had more in common with his father and not only could have been expected to have brought for joy and satisfaction to him in the few remaining years of his life expectancy, than at any other time, should be reasonably evaluated at a minimum of $30,000, in the opinion of this Court. As a consequence, plaintiff is awarded a judgment of $40,989.65 in the case of James Heider against the defendant, with costs to be taxed in one case only.

Probably because of the size of the verdict and the consequent amount of interest which conceivably could accrue thereon, the attorneys have presented a number of authorities to support their respective contentions as to the time when interest should commence. This Court has carefully examined all of the citations and is convinced that in cases of this kind which involve unliquidated damages for personal injuries, as contrasted with actions based upon contract, or the loss of specific personal property, the great

weight of both reason and authority requires that interest be computed from the date of the judgment. Motyka v. Detroit G.H. & M. Ry. Co., 260 Mich. 396, headnote 3 and p. 398.

This rule is expressly recognized and approved in Wilson v. Dohler-Jarvis, 358 Mich. 510, a workman's compensation case which plaintiff's counsel cites to support his contention that interest should start with the decedent's death but which, on pp. 517-18 actually adopts the following language from 16 NACCA Law Journal, pp. 135-6:

> "Generally in personal injury cases, courts have declined to allow interest before the date of the judgment, whereas in actions ex contractu interest is allowed from the time of the accrual of the cause of action."

Although Larsen v. Home Telephone Company, 164 Mich. 295, headnote 8, seems to approve a different rule, this Court agrees with defense counsel that to adopt it here would be to compound the damages in improperly allowing interest twice inasmuch as the Court in its instructions to the jury followed the practice recommended in Larsen v. Home Telephone, supra, in these words:

> "It may be said that a more accurate computation would be to estimate the damages suffered to the date of the verdict and add to it the present value of prospective damages."

Probably the entire subject requires further clarification by our Supreme Court. Until then, however, it would appear that this Court is obliged to follow the rule laid down in Motyka v. Detroit Ry. Co., supra, headnote 3, which states the law that still seems to be applicable, and to award interest from the date of the entry of the final judgment in both cases.

Eugene Snow Huff,
Circuit Judge.

Saginaw, Michigan,
May 9, 1962.

APPENDIX B

OPINIONS OF THE MICHIGAN SUPREME COURT

6/7 January 1964

Before the Entire Bench.

KELLY, J.

Plaintiff brings these companion cases under the Death by Wrongful Act statute (CL 1948, §691.581 [Stat Ann 1959 Cum Supp §27.711]), claiming that his sons James (12½ years of age) and David (8 years of age) were drowned in a pond on defendant's premises and that their deaths were caused by defendant's negligence.

Plaintiff demanded a jury only in the David Heider case, and defendant's request for jury trial in the James Heider case was denied. The cases were consolidated for trial, one a jury case and the other a nonjury case.

At the conclusion of plaintiff's proofs, defendant moved for a directed verdict "for the reason that the plaintiffs have failed to produce evidence * * * that would tend to establish any responsibility on the defendant for the death of the children." The court took the motion under advisement and reserved decision in accordance with the terms of the Empson Act.

February 15, 1961, the jury returned a verdict in favor of the plaintiff-administrator of the David Heider estate in the sum of $125,000.

February 28, 1961, defendant filed its motions for new trial and for judgment notwithstanding verdict, on the grounds that the verdict was against the clear preponderance of the evidence, contrary to the great weight of the evidence, and clearly excessive.

May 17, 1962, the trial court directed the entry of a judgment in the nonjury case of James Heider in the

amount of $40,989.65, and on the same date denied defendant's February 28, 1961, motions for new trial and judgment notwithstanding verdict in the David Heider case, said motions having been under consideration by the court during the time he was deliberating on the James Heider nonjury case. Defendant then moved for new trial in the nonjury case and this also was denied, the court relying on its opinion denying the motions in the David Heider case.

Question No. 1: *WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?*

James and David Heider were half-brothers and did not live together. James was raised by and lived with his grandparents since he was 8 days old. His mother and father (plaintiff Donald Heider) were divorced and the father contributed nothing to James' support.

David, the younger, lived with his mother and younger brother and sister 3 blocks from the grandparents' home, in Sebewaing, Michigan.

The father, plaintiff Donald Heider, was in Jackson prison serving a sentence of from 10 to 20 years on an armed robbery conviction at the time of the accident.

Defendant's 200 acre tract of land is located north of the village limits of Sebewaing. In order to conduct its sugar beet processing operation, it was necessary to prevent beet particles and waste containing limestone, calcium carbonate, et cetera, from running into the Saginaw bay. To meet this problem and the requirements of the Water Resources Commission, defendant, in 1944, commenced building a series of auxiliary ponds which finally culminated in 8 ponds, varying in size from 5.9 acres to 27.1 acres. The ponds are separated by dikes 12 feet high and wide enough to accommodate a motor vehicle for travel. There are no public roads on defendant's premises.

The pond in which the boys drowned was known as pond No. 3, 27.1 acres in size and, at the time of the accident, was around 7 feet deep. Said pond was located approximately in the center of defendant's tract of land.

A pipe approximately 4 feet from the top of the embankment of pond No. 3 emptied water and waste products into the pond. This chemical waste prevented freezing at the outlet and covered the surface of the water with a foamy substance for an area of 10 feet by 8 feet.

Sunday afternoon (December 21, 1958) the 2 boys left the home of their grandparents about 3:30 p.m., in subzero weather, informing the grandparents they were going to trap muskrats. When they failed to return, the grandmother conducted a search, to no avail. The marshal of Sebewaing was notified and the marshal, firemen, and citizens of Sebewaing conducted a search for well over an hour before any one thought of the possibility of the boys going onto defendant's property.

A bicycle was found on the C & O Railroad right-of-way 300 feet north of the public roadway and footprints led from this point along the tracks for about half a mile, then across a ditch to an island in the center of pond No. 3 and, after circling about, the steps led to the point where the pipe was emptying into the pond. There was a bunch of frozen foam about 3 feet from where the footprints ended.

The court in a written opinion held that the cause of death was the negligence of defendants in the maintenance of its premises contrary to legal principles, stating:

> "Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. De-

fendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored. * * *

"On the basis of a careful consideration of all the evidence and the now well established law of this State, this court concludes that neither the 2 boys nor their guardians were guilty of contributory negligence in this case and that the sole, proximate cause of their deaths in this tragic accident was the negligence of the defendant company in the maintenance of its premises contrary to the following legal principle:

"'A possessor of land who knows, or from facts within its knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.' (Lyshak v. City of Detroit, 351 Mich 230; Neilsen v. Henry H. Stevens, Inc., 359 Mich 130; 2 Restatement of Torts, §§334, 339)."

The trial court's misinterpretation of our Lyshak and Neilsen, decisions, *supra*, requires emphasis that the legal principle enunciated in these opinions was that defendant in each instance was aware of the fact that infant trespassers, were subjecting themselves to danger upon defendant's property. To establish this important point beyond question, not only in regard to this opinion but for future reference, the following excerpts from Justice Talbot Smith's opinion in Lyshak are set forth:

"The main thrust of plaintiff's argument on appeal is devoted to the proposition that defendant city knew that children 'were constantly coming onto the golf course during the summer months, just as they had been doing for over a long period of time.' From this knowledge, says plaintiff, there arose 'a duty on the part of defendant city of Detroit to keep a lookout

for such children who might be on the golf course and, in the exercise of ordinary care, to discover their presence and the presence of infant plaintiff in a dangerous situation as presented itself on the day infant plaintiff was injured and exposed to the danger and peril of being struck by a flying golf ball.' * * *

"It is clear that the plaintiff himself was not on the golf course as a matter of right. * * * A powerfully-driven golf ball in flight is a projectile of lethal qualities, as this record amply demonstrates. * * * The difference between a golf course and a rifle range, then, as a playground for children, is a difference of degree only.

"If duty is born of danger, the duty of the city of Detroit, knowing that children frequent a certain area, is clear. * * *

"To what degree does the landowner still wear the feudal mantle of special privilege, exempting him from the ordinary rules of negligence when children (yes, trespassing children) are known to frequent land upon which he is carrying on an enterprise hazardous to them? Can he simply say, 'They are trespassers' and continue as if they were not there? Can a landowner blindly throw the firing lever and explode blasting charges in a vacant lot that, to his knowledge, is used daily as a playground by (trespassing) neighborhood children? * * *

"A distinction has been drawn between the mere condition of the premises (a child falls into a natural pond) and a dangerous situation on the premises caused by the active intervention, the affirmative acts, of the owner (the child is carelessly run down by the owner's horse-and buggy). * * *

"We have mentioned, but we have not emphasized, the distinction between an injury arising from a condition of the premises and one arising from affirmative dangerous conduct by the owner. * * * In the interests

> of accuracy, it should be pointed out that the case before us does not involve injury from the mere physical condition of the premises, whether natural or artificial, and hence many of the cases cited by the city against recovery (e.g., Hargreaves v. Deacon, 25 Mich 1; Graves v. Dachille, 328 Mich 69) are not precedent for the situation before us. Here we have injury from dangerous activities conducted in a limited area which trespassers in general are known to frequent. * * *
>
> Upon these facts, infant plaintiff, even if a trespasser, was a known trespasser."

Justices Dethmers and Edwards wrote concurring opinions in the Lyshak Case. Justice Dethmers emphasized the fact that the defendant's awareness of the infant trespasser was a controlling feature, stating:

> "Here defendants knew of the presence of small children within the range of a flying golf ball before the foursome. Whether, under such circumstances, it was negligence to drive or permit the driving of a ball in the direction of such small children presented, as I think, a question of fact for the jury."

Justice Edwards, while stating that Lyshak overruled cases "where Michigan has barred recovery for injuries involving infant trespass—holding the effect of child trespass to be identical with that of adult trespass," also said: "This case concerns a child of tender years—obviously too young to look out for himself. His presence in a place of potential danger, beside a golf course fairway, was known to agents of defendant who were on the tee at the time the golf ball was driven, which caused the loss of the boy's eye."

In Neilsen v. Henry H. Stevens, Inc., 359 Mich. 130 (relied upon by the trial court), a 7-year old boy was injured when defendant's truck collided with the boy's bicycle while he was riding it in a concrete area owned by defendant. This case had been tried and determined in the

lower court prior to the Lyshak Case. It was sent back for a new trial, but the fact that defendant knew of the child's presence on its property was made clear by Justice Edwards when he stated:

> "In *Lyshak*, as in the instant case, the Court was dealing with a fact situation where plaintiff alleged active negligence on the part of the defendant toward a minor child whose presence on defendant's property in a place of danger was known to defendant."

Lyshak referred to, but did not repudiate, our early 1872 decision in Hargreaves v. Deacon, 25 Mich 1, where we held:

> "Owners of private property are not responsible for injuries caused by leaving a dangerous place thereon—but not immediately adjourning a highway—unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there."

Likewise, Lyshak referred to our 1950 Graves decision* but, again, did not overrule or repudiate this decision, but merely stated that the facts in Graves "are not precedent for the situation before us." In the Graves Case we considered the question of whether damages should be awarded in an action for the death of a 6½ year old boy by drowning in stagnant water which had accumulated in a sump on defendants' property incident to an excavation operation. After stating (p. 74), "We do not find in the record that to defendants' knowledge any boy had previously gone swimming in this sump, or that anyone had ever called to defendants' attention that such might happen with fatal results," we held that the trial judge had erroneously denied defendants' motion for a directed verdict because of the absence of proof that would justify a jury finding that defendants were *guilty of gross negligence.*

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* *Graves v. Dachille*, 329 Mich. 69.

Lyshak overruled cases referring to defendant's responsibility to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm.

Prior to Lyshak, decisions of this Court did not distinguish between a child and an adult trespasser. In Ryan v. Towar, 128 Mich 463, which was referred to with approval in Petrak v. Cooke Contracting Co., 329 Mich 564, it was held: (1) An invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice; (2) There is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises; and (3) The owner of land is not liable to trespassers thereon for injuries sustained by them not due to his wanton or wilful acts.

The trial court in the present case erroneously concluded that while it was not shown that defendant's employees had "knowledge that children trespassed upon defendant's premises to trap," he could apply the principle of Lyshak and Nielsen, *supra,* because "they knew that trespassers came upon defendant's land during the hunting and trapping season."

In the recent case of Slinker v. Wallner (1960), 258 Minn 243 (103 NW2d 377), the Minnesota supreme court upheld a directed verdict for the defendant by the trial court in an action for the wrongful death of a child by drowning, stating (pp. 248, 251):

> "In upholding recovery in these cases we have gone a long way in placing responsibility upon the occupier of premises to safeguard trespassing children. However, there must come a point where liability does not exist as a matter of law unless occupiers of land are to be held liable merely because children might stray

> onto their premises. It would seem that reasonable foreseeability is and must be a necessary prerequisite to liability. * * *
>
> "Here, the record is completely devoid of any evidence from which an inference could reasonably be drawn that the owners or occupiers of the premises involved knew or had any reason to know that children could be expected to play on these grounds any more than it is generally known that they might be found anywhere."

"Reasonable foreseeability" as a necessary prerequisite to liability is not established in this record, which is completely devoid of any evidence from which an inference could be drawn that defendant owner knew, or had any reason to know, that infant children would be trapping, playing, or trespassing upon the property.

The record sustains appellant's statement:

> "The pond in question was approximately a quarter of a mile from the nearest highway. A more desolate area could not be imagined. It was mid-winter and below zero weather. There was no reason to believe children would be in the vicinity. No employee of the defendant company had ever seen children trespassing on its premises or had specific knowledge that children trespassed thereon, as is conceded by the trial judge."

In the 1951 Petrak decisions, *supra,* we considered whether defendant-owner of road-making equipment was liable for the death of an 11-year old boy who was killed when a 1,500 to 2,000 pound beam fell on him while he and another boy were playing with a barrel of tar. In upholding a directed verdict for defendant, we, after establishing the principle that the attractive nuisance doctrine is conservatively applied in this State, said: "A reasonably prudent person would not anticipate that children in the vicinity would be likely to play with the trailer."

Applying the principles established in Petrak, we can and should conclude that "a reasonably prudent person

would not anticipate" the tragic events that led up to the death of the 2 boys on defendant's premises.

We conclude that under the evidence in this record and under the decisions of this Court, including Lyshak and Neilson, *supra*, the judgment in each case was against the clear preponderance and contrary to the great weight of the evidence.

Question No. 2: *SHOULD THE PROVISIONS OF PA 1953, NO. 201* (CLS 1956, §300.201 [Stat Ann 1958 Rev §13.1485]) *BE CONSIDERED BY THIS COURT WHEN SAID STATUTE WAS NOT RAISED IN THE PLEADINGS, NOR AT THE TRIAL, IN THE MOTION FOR NEW TRIAL, OR IN REASONS AND GROUNDS FOR APPEALS?*

PA 1953, No. 201, provides:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Appellant states:

> "Candor compels our admission that this statute escaped the attention of this brief writer until it was noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to 'any person'. The statute in question expresses the public

policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with trespassing children and beginning with *Lyshak v. City of Detroit,* 351 Mich 230."

Appellee objects to consideration of the statute by this Court in this appeal because it was not raised in the pleadings, nor at trial, motion for new trial, or in the reasons and grounds for appeal; that it is an affirmative defense and cannot be raised as part of the general issues.

My answer to Question No. 1 discloses that without the application of this statute, on the record submitted, the verdict and judgment in each case should be set aside, but as this opinion is written before acceptance or rejection by my Associates, I am answering Question No. 2.

The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below.

This rule has its exceptions, and in Dation v. Ford Motor Co., 314 Mich 152, we held that the general rule that a question may not be raised for the first time on appeal to the Supreme Court is not inflexible and will not be applied when consideration of a claim sought to be raised is necessary to a proper determination of the case.

Especially is this true where an applicable statute has been overlooked. It has been held that the party's failure to call the trial court's attention to a relevant statute does not preclude the appellate court from considering it.*

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* See 4 *CJS, Appeal and Error,* §§241, 242; *Adley Express Co., Inc. v. Town of Darien,* 125 Conn 501 (7 A2d 446); *Bedenbaugh v. Adams* (Fla. 1956), 88 So2d 765; *Yannuzzi v. United States Casualty Co.,* 19 NJ 201 (115 A2d 557); *Huntress v. Huntress' Estate* (7 CCA Ill) 235 F2d 205 (61 ALR 2d 682).

There is no claim in this case that defendant was guilty of gross negligence or wilful and wanton misconduct. There is no testimony that even infers that permission was given to the boys, or that a valuable consideration was paid by them for the privilege of going upon defendant's premises.

The statute states there must be proof of (1) payment of a valuable consideration, or (2) proof of gross negligence or wilful and wanton misconduct before a party who is on the land of another for fishing, hunting or trapping can seek damages for injuries. In the absence of proof sustaining one of these requirements, the statute specifically states "no cause action shall arise."

The total lack of proof to meet any of these requirements makes this statute applicable and should be considered by this Court as one more reason why the conclusion reached in answer to Question No. 1 should also be the answer to Question No. 2.

The cases are reversed and remanded to the lower court for entry of judgments of no cause of action. Defendant may recover costs.

John R. Dethmers
Concurred with Kelly, J.

6/7 January 1964

Before the Entire Bench:

O'HARA, J.

I am obligated to vote to reverse with instructions to enter an order dismissing the declarations for failure to state a cause of action of which the court had jurisdiction. This is for the reason that the legislature abolished the cause of action here sought to be asserted. Fairly read, it seems to me the whole thrust of the declarations is that the boys entered upon the property of the defendant to trap; that defendant had knowledge that many people

did so and that defendant was ordinarily negligent in the maintenance of the premises.[1] Altering the order of the paragraphs merely for clarity, the pleadings read:

> "27. That David Heider is the minor son of the plaintiff, Donald Heider, and on the 21st day of December, 1958 said son with his brother, James Donald Heider *and their dog set out muskrat trapping.*
>
> "28. That David Heider with his brother and dog entered the defendant's premises and walked onto one of the defendant chemical ponds.
>
> "5. That the defendant knew persons came on their land where their artificial storage ponds are located to trap for muskrats, mink, etc.
>
> "21. That the defendant failed to have any warning signs and failed to maintain the property to protect children." (Emphasis this Court's.)

The wording is identical in the companion case.

The statute[2] involved is herewith set out in its entirety:

> "AN ACT restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.
>
> "*The People of the State of Michigan enact:*
>
> "300.201 Prohibiting tort actions against landowners for recovery of damages, unless caused by negligence, etc. of owner, tenant or lessee. [M.S.A. 13.1485]
>
> "Sec. 1. *No cause of action shall arise for injuries to any person who is on the lands* of another without

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[1] In view of the statute, it matters not whether the boys were licensees, invitees or trespassers.

[2] PA 1953, No. 201 (CLS 1961 §300.201; Stat Ann 1958 Rev §13.1485).

paying to such other a valuable consideration for the purpose of *fishing, hunting or trapping, with or without permission,* against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee.

"Approved June 10, 1953." (Emphasis supplied.)

At the time of these unfortunate deaths the Constitution limited the original jurisdiction of our circuit courts to "all matters civil and criminal not excepted in this constitution and not prohibited by law." (Const 1908, Art 7, §10.[3]

No right or rights of action as pleaded here could have accrued, to the personal represenatives of either decedent, the declared acts of defendant *not* being "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof" (CL 1948, §691.581).

With or without raising the question below, the circuit court was possessed of no jurisdiction to hear and determine the merits of plaintiffs' allegations. See the long list of authorities cited in In Re Frazer's Estate, 288 Mich 392, 394 as supporting this settled principle:

> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceedings."

The principle quoted was applied in Lehman v. Lehman, 312 Mich at 105 and Bank & Trust Co. v. Wayne Cir. Judge,

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[3] For the corresponding present provision, see Const 1963, Art 6, §13.

321 Mich at 45. It is controlling here; hence my vote as indicated. The situation here is the same as if plaintiff had declared for alienation of affections. Defendant, having failed to raise the jurisdictional question in due time, should not have costs.

Eugene F. Black

Otis M. Smith

Concurred with O'Hara, J.

6, 7/January 1964

Before the Entire Bench.

ADAMS, J.

I am unable to agree with Justice Kelly that the trial court misinterpreted *Lyshak v. City of Detroit*, 351 Mich 230, or *Nielson v. Henry H. Stevens, Inc.*, 359 Mich 130. The trial judge found:

> "Defendant company certainly was carrying on a legitimate business enterprise on its own premises. It was quite clear from all the evidence in the case, however that *an extremely deceptive and treacherous condition existed in the surface of the ice around the pipe discharging water into the pond.* Defendant easily could have employed some sort of a warning device and sign to serve as notice or caution to *trappers and trespassers who were known to use that area frequently.* That would not have limited or interfered in any way with defendant's profitable conduct of its business." (Emphasis added.)

There is ample evidence in the record to support the findings of the court and jury that defendant's property was frequented by trappers, hunters, skaters and other trespassers. Richard Jahr, an employee of Michigan Sugar, testified:

> "Q. Do you conduct activity on these ponds?
> "A. Well, I've trapped them, being within that area I would say for at least 20 years. • • •

"Q. Well, did they give you permission or didn't they?

"A. They actually did not give me permission, he says in his own words, for all of them *they would like to get rid of the muskrats because they do damage on the ponds,* but if I went onto them I was on my own risk.

"Q. Now, have you ever seen any evidence while you are trapping that other people trapped up there?

• • •

"A. Yes, I seen others out there trap.

"Q. How many people do you know of that trap out there?

"A. Three that I know of." (Emphasis added.)

Max Meissner, also an employee of Michigan Sugar, testified that he had been aware of the fact that people were trapping in the area and that hunters often used the land in question, as many as 30 or 40 during a hunting season.

Floyd Taylor, a truck driver living in Sebewaing, testified it was common knowledge in the community that the Sugar Company premises were a good area for trapping:

> "Yes, I think that just about everybody that did any trapping around town knew that that was one of the best areas around, to trap."

He testified that his own boy, when 14 and 15 years old, trapped on the ponds. There was also evidence of the presence of children, small footprints having been seen and the ponds having been used for skating.

The trial judge then went on to apply the proper legal principles. Justice Kelly would not restrict the rule "to trespassers *only* where the facts disclose that defendant owner was aware that child trespassers were entering his property and subjecting themselves to danger and possible harm." The requirement of reasonable care for the safety of a trespasser is subject to no such condition. *Swanson v. City of Marquette,* 357 Mich 424. I am unable to perceive the legal or lethal difference between a "powerfully driven golf ball in flight" *(Lyshak),* "a negligently driven truck"

(*Nielsen*), "an improperly maintained electrical substation or transformer vault" (*Swanson*), and "an extremely deceptice and treacherous condition * * * in the surface of the ice around the pipe discharging water into the pond."

As Justice Talbot Smith observed in *Lyshak*:

> "We accept as commonplace today the principle that there is a duty upon all men so to conduct their activities as to minimize *the likelihood* of harm to others." (Emphasis added.)

Special findings were made by the jury in answer to the following questions:

> "Question No. 1—Was the pond where the boys met their death a place where the Michigan Sugar Company knew, or should have known, that children were likely to trespass? [x] Yes [ ] No.
>
> "Question No. 2—Was the place where the boys met their death a place where a condition existed which the Michigan Sugar Company knew, or should have known, involved an unreasonable risk of death to child trespassers? [x] Yes [ ] No.
>
> "Question No. 3—Was the utility of maintaining the pond by the Michigan Sugar Company in the condition it was slight as compared to the risk to child trespassers as involved therein? [x] Yes [ ] No"

Likelihood and foreseeability are much the same thing. I do not disagree with Justice Kelly's quotation of the rule in *Slinker v. Wallner*, 258 Minn 243 (103 NW2d 377) (1960), but I do with his interpretation of the facts in these two cases where, in my opinion, likelihood of or foreseeability of possible harm existed before the tragedies occurred.

With regard to the question of damages and whether the awards were excessive or insufficient, it is necessary first of all to determine the persons who would be entitled to share in recovery. In the case of James D. Heider, the

trial court equated the term "pecuniary injury" as used in the wrongful death act (CL 1948 §691.581 *et seq.* [Stat Ann 1959 Cum Supp [27.711 *et seq.*])* with our former requirement that the beneficiary of the statutory action suffering pecuniary injury be one who was entitled to financial support from the deceased, citing *MacDonald v. Quimby,* 350 Mich 21. At the very latest, since our decision in *Wycko v. Gnodtke,* 361 Mich 331, however, we have allowed recovery of damages for pecuniary injury in such actions not withstanding the absence of an obligation by the deceased to support the person suffering such pecuniary injury. *MacDonald v. Quimby* is applicable let to the extent that it was there held, by all members of the Court, that the persons whose "pecuniarly injury" is compensable under the death act are those who, in the variant circumstances of intestate succession, might be entitled to inherit the personal property of one dying intestate. In *MacDonald,* the deceased left surviving him a widow and children, but the Court permitted recovery of the pecuniary injury suffered by deceased's mother notwithstanding the fact that, because deceased left a widow and children surviving him, his mother would not have been entitled to inherit any of his personal estate had he died intestate.

The restriction of the class to Donald Heider, father of James D. Heider, by the trial judge was improper, since, in this case, there were other members of the class who should have been considered. The trial court said:

> "This Court finds from the evidence at the trial that the deceased James Heider had lived long enough to be able to demonstrate much more clearly than his younger brother David the talents, abilities, character, and accomplishments which gave such distinct and definite promise of a useful life and a good citizen. As a consequence, it would seem to follow irrefutably that his death would occasion the greater loss, not only to the community but also to his whole family, and that

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* See, currently, CLLS 1961, §600.2922 (Stat Ann 1962 Rev §27A.2922).

> therefore the damages should be higher in his than in his brother's case. This Court would be inclined to reach such a conclusion as a matter of simple and obvious justice."

Since the court did not make an award to cover pecuniary injury to all of James' next-of-kin, it will be necessary to remand the case for a reconsideration of such award.

Some further comment is appropriate with regard to the assessment of damages which the trial judge did made. He awarded $10,989.65 for the cost of raising James. The sum was incorrectly allocated to Donald Heider, father of James, who did not provide such cost. It should have been allocated to James D. Heider's grandfather, who incurred the cost, and who, being within the statutory class, would be entitled to recover.

The trial judge also awarded $30,000 for loss of the society and companionship of James Heider by his father, Donald Heider, who was 33 years old at the time of the trial. James was the son of his first marriage. His wife deserted the child. Her whereabouts are unknown. Heider conributed nothing to the support of James. He was separated from his second wife. In 1953, he was arrested for nonsupport. In 1957, he pleaded guilty to robbery and was sentenced to the State prison of southern Michigan. He contracted cancer and was discharged from prison July 6, 1959, on a special parole. He saw James frequently and went hunting and fishing with him. At the time of trial he had a life expectancy of two to five years. An assessment of $30,000 for the loss of society and companionship by this father upon this record cannot but raise questions. Since the assessment of damages will be redetermined, on remand for further proceedings, we need not determine whether the award made for loss of the child's society and companionship by his father was excessive. Upon retrial the court should consider carefully all elements of pecuniary injury suffered by all members

of the statutory class and he should issue the certificate authorized by the wrongful death act setting forth the amount of such damages and the proportion thereof which represents the pecuniary loss suffered by each of the members of the statutory class.

In the case of 8-year-old David Heider, the jury awarded damages of 125,000. It is asserted that this sum is excessive, against the clear preponderance of the evidence and contrary to its great weight. Appellant states:

> "Mrs. Heider, with the $125,000, at her present age would be able to purchase an annuity which would pay her a guaranteed monthly income of $455.00 for her lifetime."

The loss of companionship in David's case runs not only to the father and mother but also to a younger brother and sister. The amount of damages recoverable in actions for death by wrongful act is one peculiarly within the province of the jury. Taking into account the total family relationship, the probable dependency of the mother upon David, and the loss to the family group of the life of David over a useful lifetime, we do not find the verdict excessive.

With regard to PA 1953, No. 201 (CLS 1961, §300.201 [Stat Ann 1958 Rev §13.1485], I am unable to agree with either Justice Kelly or Justice Black. [The declarations do not disclose the applicability of PA 1953, No. 201 to bar plaintiff's asserted causes of action. Paragraphs 4, 5, and 6 of each declaration allege that the defendant knew that people went upon defendant's lands to hunt, trap, fish, and for other purposes; paragraph 27 of each declaration alleges that the two deceased boys and their dog "set out muskrat trapping"; and paragraph 28 of each declaration alleges that the boys and their dog entered the defendant's premises and walked upon one of the defendant's chemical ponds. Standing alone, such allegations are not sufficient, as it is claimed, to invoke the statutory bar of PA 1953, No. 201, on the conclusionary assumption that

the boys were "on the lands of another * * * for the purpose of fishing, hunting or trapping." Nor, of course, did the defendant plead any facts from which either the trial court or we properly could conclude that the boys' purpose in going upon defendant's land was one of the purposes named in the statute which would bar the causes of action sought to be asserted. Finally, the record as made below fails to disclose any direct evidence that the boys in fact went upon the defendant's lands to fish, hunt, or trap.]

Dation v. Foard Motor Co., 314 Mich 152, is cited by Justice Kelly in support of the proposition that, while usually a question may not be raised for the first time on appeal to the Supreme Court, the rule is not inflexible. In *Dation*, this Court was dealing with an appeal from the workmen's compensation department. A question of law arose upon the appeal which admittedly the department (as a fact finding body) could not settle even if the matter had been remanded to it. The entire question being before this Court, the Court lected to pass upon it.

The problem has not received uniform treatment. Plaintiff cites *Hollister v. Kinyon's Estate*, 195 Mich 261; *Selznick Enterprises v. Garson Productions*, 202 Mich 106; *D & W Rottschafer Real Estate v. Morris*, 245 Mich. 192; and *Shaver v. Associated Truck Lines*, 322 Mich 323. Counsel for defendant stress *Morris v. Radley*, 306 Mich 689, in support of the exception to the rule and argue that we should apply the exception here to avoid a miscarriage of justice because of the inadvertence of counsel in overlooking and failing to raise the application of the statute before the trial court. This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or, under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.

Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and brief. For these reasons it is not applicable

at this late juncture in the case of David Heider. Litigation must come to an end. Defendant has had its day in court with ample opportunity to raise and present all defenses. It is not the function of this Court to correct, on review, the inadvertence or failure of counsel to present what might have been a defense.

In the case of James D. Heider, upon remand the trial court will determine any questions of fact which may be raised and especially the question as to whether he went on "the lands of another * * * for the purpose of fishing, hunting or trapping." The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; whether the classification of the statute violates the due process clauses of the United States and Michigan Constitutions and the equal protection clause of the United States Constitution.

The judgment in the case of Donald Heider, Administrator for the Estate of James D. Heider, is remanded for consideration of the applicability of PA 1953, No. 201, supra, and for possible reassessment of the damages therein. Costs to neither party, each having prevailed in part.

The judgment in the case of Donald Heider, Administrator for the Estate of David Heider, is affirmed. Costs to appellee.

Theodore Souris

Thomas M. Kavanagh

Concurred with Adams, J.